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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Docket Number (Optional)

309J-000310US

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on August 30, 2007Signature Typed or printed name Evelyn Gomez'

Application Number

10/620,315

Filed

July 14, 2003

First Named Inventor

Moshe Rosenberg

Art Unit

1761

Examiner

Melissa S. Mercier

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)

☒ attorney or agent of record. 41,595  
Registration number \_\_\_\_\_

☐ attorney or agent acting under 37 CFR 1.34.  
Registration number if acting under 37 CFR 1.34 \_\_\_\_\_

Signature

Gary Baker

Typed or printed name

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Telephone number

August 30, 2007

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

☐ \*Total of \_\_\_\_\_ forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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QUINE INTELLECTUAL PROPERTY LAW GROUP, P.C.

By:

Evelyn Gomez

Appl. No. 10/620,315  
Applicant: Moshe Rosenberg et al.  
Filed: July 14, 2003  
TC/A.U. 1761  
Examiner: Melissa S. Mercier

Confirmation No. 7949  
Docket No.: 309J-000310US  
Customer No.: 22798  
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**REASONS FOR REVIEW REQUEST**

In response to the final Office Action dated April 3, 2007, Applicants herein submit a Request for a Pre-Appeal Brief Conference and accompanying Notice of Appeal. The Office has cited alleged obviousness as grounds for rejection. Applicants submit that the rejections of record are not proper and are without basis, and respectfully request that rejections for alleged obviousness be withdrawn.

**A. The Rejections under 35 USC § 103 are Improper Based on Perrier Alone**

The Office is incorrect in alleging, e.g., in the Advisory Action of June 28, 2007, that Perrier "aqueous solution used to dissolve the plant proteins contained in the pulverulent preparations prior to drying the particles, is the same as the instant gel. Perrier additionally discloses the suspension is stable and can be used in the form of a gel. Therefore the rejections of claims over Perrier are maintained for reasons of record." Applicants note that the rejection is improper (as discussed at pages 9 and 10 of Applicant's Response of May 30, 2007) for failure to allege a teaching of all limitations of any claim, failure to provide a relevant motivation for one skilled to modify Perrier, and for failure to state an expectation of success, as required by controlling case law.

Perrier only teaches protein cross-linking at the surface of a hydrophobic interface (see, e.g., the Abstract). Perrier does not describe, e.g., a composite gel of a dispersed phase embedded within a continuous phase matrix of cross-linked proteins, as required by the claims, as is understood in the art, and as described in the original specification. No office Action in this case has actually alleged such a composite gel is taught by any reference.

Perrier discloses particles with walls of proteins cross linked on their surfaces (interfacial cross-linking). This is not a gel; much less a composite gel of a dispersed phase embedded

within a continuous phase matrix of cross-linked proteins. The rejection, continued in the Advisory Action, allegedly finds the gel of the instant invention in the "aqueous solution used to dissolve the plant proteins contained in the pulverulent preparations prior to drying the particles." Applicants note that an aqueous solution of proteins is not a composite gel of a dispersed phase embedded within a continuous phase matrix of cross-linked proteins. The solution of proteins is not cross-linked. Furthermore, the cited solution of proteins is not even a gel. These allegations do not form the basis for the rejection.

Applicants can not find support in Perrier for the Advisory Action statement that the "suspension is stable and can be used in the form of a gel". Applicants, with a diligent search have been unable to find such a teaching. Even if the statement were true, it still does not allege a continuous phase matrix of cross-linked proteins. Searching Perrier, Applicants found, e.g., at column 14, line 48, that Perrier has taken his particles and suspended them into preformed, non-protein non-crosslinked gels, such as xanthan gels, where the particles were found to be stable. However, a xanthan gel is not the gel of the claimed invention.

Applicants briefly note that if one of skill were "motivated to determine optimum amounts to get the maximum effect of active compounds", as alleged in the final Action of April 3, 2007, this would not logically result in modification of Perrier to provide the present claimed inventions. For example, changing amounts of Perrier constituents can never result in the composite gels of the present claims. The Actions have failed to present a case of all limitations, motivation and expectation of success, with regard to Perrier, in any combination.

#### **B. The Rejections are Improper Based on Perrier In View of Richardson**

The Examiner may have dropped the rejections based on Perrier in view of Richardson, because there is no reference to these rejections in the Advisory Action. However, Applicants refer to the discussion at pages 11 and 12 in the Response of May 30, 2007 with regard to this combination of references. Applicants note that the dry brown cakes of Richardson do not provide limitations of the claims not found in Perrier. The combination would be unmotivated for teaching away and for incompatibilities between the technologies. There would be no expectation of success.

### **C. The Rejections are Improper Based on Dollat In View of Perrier**

It has been "the Examiner's position that once the emulsion is allowed to cool, a gel would form." And that "[i]t would have been obvious to a person of ordinary skill in the art to substitute the cross linking agents disclosed by Perrier into the composition taught by Dollat." See the final Office Action of 4/3/07, page 8. However, as noted in the Response of 5/30/07, at page 13, the cited combination would not provide the composite gels, as claimed. For example, cooled gel cited in the action is not a composite gel of cross-linked proteins. Dollat does discuss cross-linking with aldehydes, but this aspect is specifically excluded from the invention, as claimed. So, Dollat teaches away from the claims. It is worth repeating that the cross linkers of Perrier are hydrophobic molecules hydrolyzed and destroyed in the presence of water and are specifically designed to form protein walls at lipid-water interfaces. As stated in the Response, the alternate cross-linkers of Perrier also teach away from the present invention and could not result in the composite gels of the present invention in combination with Dollat.

The general conditions of the references can not be "optimized" to provide the present invention, as suggested in the rejections, e.g., because it would require research in a different direction into several different process conditions and several different composition constituents and different constituent proportions, and still the result would not describe the present claims. Furthermore, the stated motivation to obtain "the desired product" by achieving a "maximum viscosity" is irrelevant to the present claims. Applicants note that Perrier and Dollat separately achieved their desired products. Motivation based on hind-sight review of Applicant's specification is not a proper motivation for a combination of references. Again, the combination would provide an undesirable product and there would be no expectation of success in the combination.

A *prima facie* case has never been made for the obviousness rejections, e.g., for failure to identify all limitations of the inventions as claimed, failure to provide a reasonable and relevant motivation for the cited combinations and modifications of the art, and for failure to provide a factual rationale for an expectation of success.

### **D. Summary**

Applicants submit that the claims meet the requirements of 35 USC §§112, 102 and 103, being novel, non-obvious and extensively described in the specification. In light of the summary

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provided herein and the extensive prosecution history, Applicants respectfully request that the rejections be withdrawn and the claims be considered allowable.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary Baker", is written over a horizontal line.

Gary Baker, Esq.  
Reg. No: 41,595

Attachments:    1) Notice of Appeal;  
                      2) Form PTO/SB/33 (Pre-Appeal Brief Request for Review);  
                      3) Petition for a 2-month extension;  
                      4) A transmittal sheet;  
                      5) Fee transmittal sheet; and,  
                      6) Receipt indication postcard.